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TESTIMONY IN OPPOSITION TO RAISED BILL 6487
JUDICIARY COMMITTEE PUBLIC HEARING, MARCH 4, 2011

Members of the Judiciary Committee:

I am a lawyer whose practice is substantially devoted to the representation of physicians in medical malpractice cases in Connecticut. I am a co-author of Connecticut Medical Malpractice - a book devoted to the subject of medical malpractice law in Connecticut. On behalf of myself and many of the physicians we represent, I would urge the Committee to reject Raised Bill 6487 for the following reasons:

1) It should be recognized at the outset that the fine print of Raised Bill 6487 would amount to virtually a complete gutting of the opinion letter requirement as it was originally enacted into law in 2005 and has been interpreted by many judicial decisions including four decisions of the Supreme Court[1]. It would effectively overrule the decision of the Supreme Court in Bennett v. New Milford Hospital, 300 Conn. 1 (2011) with respect to the similar health care provider requirement. By substituting the word "may" for "shall" with respect to the dismissal remedy, it would eviscerate the statutory requirement of an opinion letter. By postponing any challenge to the qualifications of the opinion letter writer to the end of discovery, it would make the "similar health care" requirement of the opinion letter meaningless. By eliminating the requirement for a "detailed basis" of the opinion, it would at least arguably reduce the opinion to the *ipse dixit* of the letter writer. By requiring that a motion to dismiss be filed within 60 days of the return date and providing that any defect could be cured within 30 days, it renders the statute an empty formality. As a practical matter, the enactment of this bill would effectively repeal the certificate of merit statutory scheme.

2) As the Committee may recall, the "certificate of merit" feature of the law was an outgrowth of the tort reform debates of 2004-2005. These were debates which, for the most part, were *lost* by the medical profession. The primary goal of the medical profession in those debates was the imposition of caps on non-economic damages. In 2004, the General Assembly passed a reform measure without caps which was vetoed by Governor Rowland. The General Assembly returned to the subject in 2005 and adhered to its decision to reject caps but enacted a variety of

[1]Dias v. Grady, 292 Conn. 350 (2009); Bennett v. New Milford Hospital, 300 Conn. 1 (2011); Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011); and Shortell v. Cavanaugh, SC 18434 (decision announced on Judicial Department website on March 3, 2011).

other reform measures intended to reduce malpractice insurance rates. One of these was the opinion letter requirement of General Statutes §52-190a - a provision expressly intended in the words of Representative Lawlor to make medical malpractice cases "much more difficult to bring". [48 H.R. Proc., Part 31, 2005 Sess. June 8, 2005, pp. 9445-9446]. Another purpose in the words of Senator Kissel was to "narrow down exactly" what was the basis of the plaintiff's claim [48 S. Proc., Part 14, 2005 Sess., pp. 4428-4429]. The passage of Raised Bill 6487 would be a rejection of this history.

3) The enactment of the opinion letter requirement was part and parcel of an extensive and comprehensive analysis of the subject of medical malpractice policy in 2005. By contrast, the enactment of Raised Bill 6487 standing alone in 2011 would amount to a unilateral dismantling of one leg of a complex legislative compromise in 2005. It is not good public policy to enact legislation in such an incremental way. Unless the General Assembly in 2011 is prepared to once again undertake the extensive study of the subject that it did in 2004/2005 or to seriously consider any number of numerous reforms that the medical profession might proffer, it is better not to tinker with the statutory scheme in such an obviously one sided way.

4) As it happens, considerable "water has passed under the bridge" since the subject of changing this statute was first considered a year ago. Judicial decisions have fleshed out the meaning of the statute in a way that will reduce further litigation. Just yesterday, the Supreme Court ruled in Shortell v. Cavanaugh, SC 18434 that an opinion letter is not needed in an informed consent case (thus rendering this provision of Raised Bill 6487 unnecessary). In particular, the announcement of a pair of Supreme Court decisions earlier this year has substantially reduced any perceived need for changes to the statutory scheme. In Bennett v. New Milford Hospital, 300 Conn.1 (2011), the Court held that any dismissal under the statute would be without prejudice. In Plante v. Charlotte Hungerford Hospital, 300 Conn. 33 (2011), the Supreme Court held that a medical malpractice case dismissed for non-compliance with General Statutes §52-190a may be revived after the expiration of the statute of limitations or repose under the Accidental Failure of Suit statute as long as the original non compliance was not the result of egregious conduct or gross negligence. As a practical matter, these latter two rulings mean that meritorious cases will not be lost for legal technicalities while yet preserving the gatekeeping function that the statute was originally designed to implement. In light of this forgiving legal climate, there is no longer any need to whittle away the statute to nothing.

5) Raised Bill 6487 is virtually identical to Raised Bill 5537 in 2010 which was not enacted into law. The public hearing on Raised Bill 5537 on March 24, 2010 contained supporting testimony from the Connecticut Trial Lawyers Association and opposing testimony from the Connecticut Hospital Association, the Connecticut State Medical Society, the law firm of O'Brien, Tanski & Young, the Connecticut Medical Insurance Company, and Pro Select Insurance Company. The opposing testimony from the latter five organizations is as valid today as it was in 2010 and I urge the Committee to consider it as part of their deliberations. As the

Committee is aware, this information is easily available on the General Assembly website.

I hope the above observations are helpful and I thank the Committee for its consideration.

Sincerely,

Frank H. Santoro